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Marini v. Ireland (1970)

Protecting Low-Income Renters by Judicial Shock Therapy

RICHARD H. CHUSED

Within a thirty-four-day period in 1970, courts in Illinois, Washington, D.C., and New Jersey announced decisions that dramatically altered a central aspect of landlord-tenant law—the ability of landlords to summarily dispossess tenants for failure to pay rent. Each decision reached essentially the same conclusion: tenants were entitled to defend against summary dispossession if conditions in their residences endangered health and safety or if there were other unfair conditions imposed on their tenancies. These decisions opened the floodgates of change. Other reformist court decisions or legislative enactments followed in almost every state. The stories of the Illinois and D.C. decisions, *Rosewood v. Fisher* and *Javins v. First National Realty, Corp.*, have been told elsewhere in great detail; and most first-year law students around the nation read *Javins* in their property law courses. But, surprisingly, the New Jersey Supreme Court's decision in *Marini v. Ireland* has received much less attention.² Placing that decision more solidly on the historical record is long overdue.

The importance of a major case is difficult to measure without knowing something about the social, cultural, and historical background of the dispute. *Marini* arose out of the maelstrom that was New Jersey in the 1960s. When I arrived at Rutgers University School of Law in Newark during the summer of 1968 to begin my teaching career, Newark was in chaos. The Reverend Martin Luther King Jr. had been assassinated on April 4. From July 12 to July 17 the summer before, rioting had left the core of the city in shambles. Whites had already left the city in large numbers to move to the suburbs, and the flight accelerated after 1967. Within a few years of my arrival, many of the main businesses in the downtown core downsized or closed, leaving empty building hulks behind. Driving up Springfield Avenue—the main 1967 riot corridor—was to go through a depressing stretch of poverty, gutted buildings, empty lots, and littered streets.

Crime rates skyrocketed. The city, in short, was a wreck—the butt end of tragic jokes on television and devastating commentaries in the media. It routinely was placed on lists of the worst cities in America.³

Camden, Newark's sister city in distress to the south and the site of the building that gave rise to *Marini*, also was in terrible condition. Riots sparked by the police beating and death of a Puerto Rican motorist erupted in August 1971, not quite a year after *Marini* was decided by the New Jersey Supreme Court. Major industrial facilities, including large plants run by RCA and the New York Shipbuilding Corporation, downsized or closed during the 1960s.⁴ Between 1950 and 1970 the town's population declined by about 17 percent, and by an equal amount from 1970 to 1980.⁵

The alarming situations in Newark, Camden, and other inner-city areas of the nation's most densely populated state had a palpable impact on the New Jersey Supreme Court's desire to bring landlord-tenant disputes before it and on its overtly reformist resolution of the legal issues. Just as the relationships among poverty, politics, urban disturbances, and the law in Washington, D.C., profoundly influenced the decision in *Javins*, so too the desperate situations in Newark and other cities deeply affected judicial developments in New Jersey.⁶

In this chapter, I reconstruct some of that history—presenting a portrait of the times and describing some of the reasons the courts responded aggressively to the problems they perceived. To do that, I will take a four-stage journey. First, I will provide a few intimate, personal stories to bring to life how desperately bad the situation in Newark, and by implication other New Jersey cities, was in the late 1960s. Second, I will present a portrait of how the New Jersey Supreme Court responded to the crisis. That will entail a trek through landlord-tenant law as it was prior to the decision in *Marini*, as well as a look at the court's decision in *Reste Realty v. Cooper*⁷—a crucial opening gambit in the reforms *Marini* instituted a year later. That tour should make it easier to understand why, as a matter of traditional legal logic, the *Reste* and *Marini* opinions were partly untenable, if not incoherent. The extraordinary nature of the opinions symbolized the level of desperation felt by the New Jersey Supreme Court and the compelling power of demands among urban residents for change in the operation of the state's landlord-tenant courts. The court must have concluded that eviction law needed some shock therapy. Third, I do not want to leave the impression that New Jersey's high court behaved much differently or more irrationally than courts in other states. A very brief description of events elsewhere will make that clear. Finally, you might be curious about whether all the hoopla actually accomplished very much. I will end with a few brief thoughts on that issue.

Setting the Stage

The atmosphere at Rutgers Law School when I arrived in 1968 to join the faculty was tense and frenetic. You could cut the anxiety with a knife. After the riot in 1967 and the assassination of Martin Luther King Jr. in 1968, the school was the site of negotiations among representatives of the city, county, and state governments with members of Newark's black community over what various government entities, including the law school, should do. Those discussions led to a decision by Willard Heckel, then dean of the law school and a remarkable human being, and others in the law school community to seek approval from the faculty to establish three clinics—the Constitutional Litigation Clinic, the Administrative Process Project (a law school-run bureau in the state attorney general's office to create new methods to enforce fair housing laws), and the Urban Legal Clinic—in that order at the rate of one a year.⁸ At my first faculty meeting, the vote was taken and, not without controversy, the clinics were approved. The Constitutional Litigation Clinic was established immediately and the other two followed. I was quickly thrust into discourse about the depth of need in the Newark community for law reform and action, a discourse that deeply affects the structure of legal education in New Jersey to this day.

Other events were even more telling. Two stand out, both related to control of the government of Newark by a corrupt, deeply racist white power structure. Shortly after my arrival in Newark, lawyers and law teachers were asked to participate in a court-watching project at the city's municipal court. Stories about mistreatment of black citizens by the court were legion. Various community groups, as well as the local chapters of the American Civil Liberties Union and the National Lawyers Guild, wanted to document them. Lawyers were sought out for the court-watching task to reduce the likelihood that court personnel would push the visitors around.

Down Broad Street I went with my yellow pad and pencil. I arrived early and sat near the back—the only white person in the public seating area. White court personnel—bailiff, clerks, and others—milled around at the front. The mood got ugly as those having business before the court began to arrive. The white court personnel, speaking quite loudly to ensure that those in the black audience heard their remarks, began spouting verbal harangues about niggers, welfare queens, absent fathers, and criminals. My jaw dropped in amazement. My yellow pad began to fill up.

After a few minutes of this, one of the court officials came over and asked me in a less than kindly manner what I was doing there. For the first time in my life, I pulled rank, saying I had just arrived in town to take a job teaching at Rutgers Law School and commenting that I wanted to see how things worked in the city. He coolly stared at me for a moment and left me alone. But even after the court personnel knew who I was, their nasty verbal assaults continued. They must have thought their power was unchallengeable.

The judge's attitude toward the litigants was not much better. Although he did not use any overtly nasty language, his demeanor could be characterized at best as curt. Anger among the court's clients was clearly visible in their body language, tone of voice, and demeanor. The experience made clear to me more than anything else could why the city had exploded in violence the year before.

Two years later much of the black political community supported Kenneth Gibson's campaign to become the first black mayor of the city. White out-migration and black in-migration over the previous twenty years had increased the possibility that a black candidate could win the seat. On Election Day in 1970, law faculty and students were asked by the Gibson campaign to serve as poll watchers. A group was assigned to a spot in the all-white North Ward. They were not greeted with open arms at the polling place. A law student and I were asked to pick them up when their shift was over. We went to the polling place to meet the team and walked as a group back to the car. A group of thugs chased us. We got away by the skin of our teeth—scrambling into a Volkswagen Beetle as our pursuers bent the hinges of one door out of shape just as we sped away. The drive back to the law school was frenetic as we raced down the streets with one door unable to be fully closed. Our testimony at an emergency chancery court hearing a short time later led to the impoundment of the ballot boxes. Newark, like other cities in the state with deeply felt racial tensions, was a very nasty place. Although Gibson won the election, the campaign's rough edges left an indelible impression on those living in both Newark and the rest of New Jersey.

Such personal anecdotes only touch the surface of Newark's troubles in the late 1960s and early 1970s. The rapidity and depth of the city's decline were remarkable. Between 1950 and 1970, the population of the city fell by 13 percent. But that single data point hides an incredible flow of humanity into and out of Newark. In that same twenty years, the city was transformed from a majority-white to a majority-black metropolis—the white population of Newark declined 54 percent, while the nonwhite population increased by 183 percent.⁹

Such dramatic shifts were accompanied by wholesale disruptions in the fabric of urban life, striking changes in commuting patterns and job locations, and a significant drop in the number of middle-class residents and resident property owners. As middle-class whites left, they were not replaced by either a similar number of people or a population as financially capable of buying property, maintaining businesses, and reconstructing a framework of social and economic life designed for the needs of the new residents. The transition was made more difficult by the unwillingness of many majority-white financial and other institutions to provide assistance or support to the incoming urban dwellers. Social service organizations, nonprofit support groups, religious institutions, and other establishments closed and often were not replaced.

TABLE 2.1.
Changing Demographics of Newark

<i>Year</i>	<i>Newark total population</i>	<i>White population</i>	<i>% population white</i>	<i>% decline in white population</i>	<i>Nonwhite population</i>
1950	438,776	363,149	82.8		75,627
1960	405,220	265,889	65.6	26.8	139,331
1970	382,417	168,382	44.0	36.7	214,035
1980	329,248	101,417	30.8	39.8	227,831
1990	275,221	78,771	28.6	22.3	196,450
2000	273,546	72,490	26.5	8.0	201,056

Source: U.S. Census data, 1950–2000.

As George Sternlieb summarized the situation in his classic study, the decline in Newark's housing stock was due in significant part to the decline of resident ownership of leasehold property:

[T]here is no question of the significance of landlord residence, particularly single-parcel landlords, as insurance of property maintenance of slum tenements. Given the priority accorded by multiple-parcel owners to tenant problems as an inhibitor [to upkeep] . . . the lack of feeling on this score by resident landlords, coupled with their good record in maintenance, is most significant. It is the resident landlord, and only the resident landlord, who is in a position to properly screen and supervise his tenantry. No one-shot wave of maintenance and paint up-sweep up campaign can provide the day-to-day maintenance which is required in slum areas. Given the relatively small size of Newark tenement units, and others like them, this can only be accomplished by a resident landlord. The record of these landlords . . . is such as to inspire confidence in their future behavior on this score.¹⁰

The vast scope of problems confronting urban New Jersey was catalogued by two reports issued in 1968—the Kerner Commission Report, assembled by the National Advisory Commission on Civil Disorders convened by President Lyndon Johnson in response to the nationwide stream of riots between 1965 and 1967, and the Report for Action, the lengthy commentary issued by the Governor's Select Commission on Civil Disorder in the State of New Jersey.

The Kerner Commission spent a great deal of time studying the situations in Detroit and New Jersey—sites of two of the worst outbursts of urban disorder.¹¹ In both the federal and state reports, concerns were expressed about tensions between largely white police departments and residents of black communities, poor housing conditions, the impact of urban renewal and highway construction programs, unemployment, dysfunctional schools, poor health care, and the widespread perceptions that courts operated arbitrarily and unfairly.

Anyone living and working in New Jersey in the late 1960s knew that major portions of the state were in deep trouble. Both politicians and courts sensed a need for urgent action. Whether that sense of urgency emerged from fears about additional racial disorders or heartfelt desires to begin solving deep social wounds made little difference. There was both a local and a national consensus that something had to be done. For a brief historical moment, major legislative reforms were adopted and courts took risks by joining the efforts. Congress adopted Civil Rights Acts in 1964, 1965, and 1968.¹² The Office of Economic Opportunity was created in 1964 as part of President Johnson's War on Poverty.¹³ Among many community-based initiatives, that agency developed the still-extant Head Start and national legal services programs.

The Judicial Response

Given the distressing events occurring across the nation and in New Jersey, as well as the growing restiveness and voting power of black citizens, it is easy to understand why those sitting on the New Jersey Supreme Court felt there was an urgent need to grapple with some of the issues within their control. They certainly sensed that "rebellion" was brewing outside, that one of the commonly articulated reasons for the riots in Newark and elsewhere in the state was the perception among black and poor people that judicial forums they frequented were unfair, and that reforms in some areas were long overdue.¹⁴ The New Jersey Supreme Court then had a well-deserved reputation for initiating major reforms in noncriminal legal doctrine,¹⁵ and the justices sitting on the court in the late 1960s and early 1970s, as a group, were generally open to arguments for changing existing law.¹⁶

When presented with an opportunity to decide two landlord-tenant cases shortly after Martin Luther King's assassination, the court moved forward with its law reform agenda. On May 14, 1968, only forty days after King's death, the justices agreed to review the appellate division decision in a commercial lease dispute—*Reste Realty Corp. v. Cooper*. Arguments were heard on November 18, and the decision was rendered the following year on March 17, 1969.¹⁷ The *Reste* dispute, though not directly about the ability of residential tenants to raise defenses when landlords sought their eviction for nonpayment of rent, still

provided the court with an opportunity to weaken or remove a series of old legal obstacles to reforming landlord-tenant courts.

About six months after *Reste* was decided, the court, aware that *Marini v. Ireland* was pending in the appellate division, certified the case on its own motion for immediate review. That action was unusual and spoke volumes about the court's determination to deal with landlord-tenant issues. Arguments were heard in short order on February 16, 1970, and the decision was issued only three months later—on May 18, 1970—while the Gibson mayoral campaign was gearing up.¹⁸

Preexisting Eviction Law

Why did landlord-tenant law become such a focus of attention for both those agitating in the streets of Newark and those sitting on the New Jersey Supreme Court? The state of the legal doctrine just before the justices heard arguments in *Reste* was horribly outmoded. Its impact—deeply felt in impoverished urban communities all across the nation—is best described by another tale. While in law school, I went to visit the landlord-tenant court in Chicago as part of a 1967 summer internship working with a tenants' union on the near north side of the city. I watched the long call of cases at the beginning of the court day. Most of the calls went unanswered by tenants, leading to the issuance of default judgments for landlords.

When cases finally began to be called for "hearings" where tenants had shown up, they were handled in remarkably rapid fashion. The cases of a single landlord were called in sequence so that lawyers representing different landlords would not have to constantly shuffle back and forth to the dais. Before the landlords' lawyers could say anything, the judge usually asked the tenants, "Have you paid the rent?" The answer generally was no. Without waiting for an explanation, the judge would say, "Judgment for possession for [name of the landlord]. Call the next case." In short, tenants were summarily evicted for not paying rent no matter what the circumstances.

One particularly poignant case has stuck in my mind for these last forty-five years. I wrote about it in a 2007 article.

The cases were being called by the clerk when an elderly, thin, white woman rose from her seat in response to hearing her name. Her gait was quite slow—stooped over and supported by a wooden cane. She was dressed in a frilly, long white dress and a white hat with a veil. It struck me that she had picked out her finest clothes to wear that morning. Perhaps her generation thought it appropriate to dress up for a court appearance—like going to church. But this was no church. When she was about half way to the front of the court—even before she passed the bar—the judge impatiently asked, "Have you paid the rent?" She

looked up at him as best she could and began softly speaking. "No, but. . . ." She was cut off in mid-sentence by the court curtly saying, "Judgment for landlord. Call the next case." The woman continued to slowly approach the bench, raising her right hand—her left still resting on the cane—as if she was trying to get the judge's attention. The room became unusually quiet. Her apparent desire to continue talking was stopped by the judge who without a hint of emotion leaned forward and said, "Ma'am, your case has been decided. You can go now." Crestfallen, she slowly turned and with small, careful steps, worked her way toward the rear of the room. The next case was called and decided before she reached the courtroom door. A few tenants watched her sadly. Attention to her quickly faded as additional cases were called and quickly disposed of. I was stunned. I often wonder what happened to her. Where did she go?¹⁹

What sort of theater was I watching? This was a courtroom where only one bit of information was deemed important—whether the rent had been paid. No other aspects of the landlord-tenant relationship were allowed to disturb the march of "justice." The Chicago result was callous at best, but the court followed the existing "law" to the letter—just as New Jersey courts did for decades in deciding cases in exactly the same fashion. Two sets of legal rules combined to produce these results—one dealing with the substantive nature of a lease and the other with the procedures used to evict residential tenants. The combination produced tribunals that urban tenants viewed as blatantly favorable to landlords and devoid of sympathy for the plight of even the most impoverished tenants residing in deplorable conditions.

The early substantive law of land leases arose in largely agricultural settings. In return for virtually unchecked authority to use land, a tenant agreed to pay rent, to maintain the land, and to return it in its original condition to the owner when the lease expired. In those days, the most important asset leased was usually the land itself. Requiring the tenant to maintain it was probably sensible. As a result, English law provided for an "action in waste"—an action by the true owner for damage to the property or to its value occurring during possession by a nonowner like a tenant,²⁰ a position absorbed into New Jersey's statutes in 1795.²¹ If, during the nineteenth century, a tenant destroyed a barn or cut down all the timber (rather than just the amount needed to cook or keep warm) on a parcel of land, the landlord could recover damages.

As New Jersey began to industrialize, the old rules were applied to commercial tenants without much thought about whether changing circumstances should lead to changes in the rules. In *Moore v. Townshend*, the first leasehold repair case decided by New Jersey's highest court, a landlord claimed that a glassworks factory tenant failed to maintain the facilities, including the molds

and tools which came with it.²² The tenant was required to pay \$550 to the landlord in damages.

This rule of waste law worked in tandem with limitations imposed by nineteenth-century contract law and civil procedure rules. Traditionally, contract claims were limited to those arising from a single covenant or contractual provision. Defendants could raise only defenses specifically related to that claim. What we now know as a counterclaim—the right to respond to a lawsuit by filing another one back against the plaintiff—was barred. If a landlord sued a tenant for the rent, the tenant could not defend by arguing that the landlord had breached a promise to maintain the premises. Such a claim could only be resolved in a separate case brought for that purpose. The claims by landlord and tenant were independent of one another.

This is demonstrated well by the early twentieth century case of *Stewart v. Childs Co.*²³ Childs Company agreed to lease a building from Stewart for a restaurant and a "steam apparatus that perfects the coffee" in the basement. The twenty-year term began in 1902. The lease agreement contained express covenants providing that the tenant would pay the \$3,000 yearly rent when it fell due and that the landlord would "at all times during the said lease keep the said cellar waterproof at his own expense." The basement turned out not to be waterproof. The landlord did not make repairs or install adequate pumping equipment. As a consequence, Childs Company abandoned the premises in 1909, and the landlord sued for rent. The court ruled that the covenant to pay rent and the covenant to keep the basement dry were independent, that "breach of the covenant to keep the cellar waterproof was not a defense to an action for rent," and that the tenant had to pay the rent when it fell due despite the fact that the landlord violated the terms of the lease.

The Childs Company attempted to defend the action for rent not only by claiming that the dry basement covenant and the covenant to pay rent were interdependent, but also that Childs had been "constructively evicted" from the premises. Constructive eviction excused a tenant from the obligation to pay rent when the landlord failed to deliver possession to the tenant or took actions that deprived the tenant of all ability to use the premises. Even though a tenant's promise to pay rent was independent of virtually all the landlord's promises in a lease, a landlord still was obligated to leave the tenant in undisturbed possession for the full term of the lease. That minimal level of mutuality was required in order to prevent landlords from renting property, kicking tenants out, and suing them for the rent.

Even though Childs Company was not able to operate its coffee equipment or store goods in the basement, the court refused to find that it was constructively evicted. "We are unable to find," the court wrote, "any evidence that shows that the landlord . . . did anything with the intention of depriving the tenant of

the enjoyment of the premises." The tenant's right to possession of the building was not disturbed. The tenant, after all, was free to arrange for the water to be pumped out of the basement! While the lessee was free to file another case in contract alleging breach of the dry basement covenant, the rent had to be paid in the meantime.²⁴

The final piece of the nineteenth-century legal structure was put in place in 1847 when New Jersey adopted a statute permitting the summary dispossession of nonpaying tenants. As towns and cities grew, pockets of poverty emerged, transiency became more common, and migration to western areas of the nation increased, and landlords began to complain about their inability to arrange for speedy transitions from one tenant to another. Ejectment, the traditional claim for possession of land, was slow, cumbersome, and laden with requirements that sometimes protected tenants.²⁵ The same issues had arisen in New York earlier in the century, resulting in adoption of "summary dispossession" legislation in 1820.²⁶ The New York statute became the model for New Jersey twenty-seven years later. A provision barring all appeals from summary actions was tossed in for good measure.²⁷

As a result, New Jersey tenants not only were barred by substantive contract rules from raising virtually all contractual defenses or filing any counterclaims to suits seeking payment of overdue rent, but they also could be removed quickly if they failed to pay. Those tenants with valid claims were forced to either continue paying rent while they pursued their claims or cede possession and pursue their issues later. In general, summary dispossession courts required quick responses by tenants, barred use of counterclaims, and allowed removal of tenants in as little as a month. The lack of legal assistance for poor urban tenants made it virtually impossible to mount a sustained judicial challenge to those practices or to lobby legislatures for change. As a result, nineteenth-century eviction practices remained intact until the New Jersey Supreme Court decided *Reste and Marini*. There is no need to put a polite gloss on the situation. Landlord-tenant courts in Newark and every other large city in the nation were ugly places. My experience watching that elderly woman walk out of the courtroom in Chicago symbolized the anguish of the era—a sometimes seething anger in minority and poor communities at the unwillingness of people in positions of authority to see unfairness even when it was literally staring them in the face.

Intervention of the New Jersey Supreme Court

Reste Realty v. Cooper was a surprising vehicle for the initiation of reforms in New Jersey's residential landlord-tenant law. It was, after all, a commercial case. After the landlord's oral promise to repair a leak allowing rainwater to seep into the rented space went unfulfilled, the tenant moved out. On its face, it was a simple constructive eviction dispute—one the court could easily have decided

for the tenant without much ado. But the justices saw a chance to make some pronouncements and, given the historical circumstances, took it. The court's resolution of the litigation, a suit for rent against a tenant forced to relocate her business because of rainwater leaking into the lower level of Reste's building, led to two important changes.

First, the court concluded that a lease was a modern contract, with its covenants and clauses part of a unified legal instrument structuring a relationship between two people or entities. The residue of the old independent covenant idea was washed away. Second, the test for constructive eviction was substantially eased. Rather than requiring tenants to show that they were permanently deprived of possession by actions of the landlord, the court ruled that tenants only had to show a material breach of the leasehold contract or some substantial interference with their right to possess the premises.

Highlighting the three kinds of legal verbiage used in the opinion makes it easier to understand how extraordinary the court's results were. The first change in the old constructive eviction requirement that a tenant be "permanently deprived of possession" involved property-law talk about the covenant of quiet enjoyment—the boilerplate clause in every lease guaranteeing that a tenant's property right to possession will not be disturbed by the landlord during the term of the lease. The second form of verbiage about "material breach" was contract-law talk and took explicit advantage of the contract law concept favoring interdependence of the various clauses of a lease. The third form of verbiage about "substantial interference with possession" was tort-law talk and placed duties of care on landlords. Put more simply, the court pulled ideas from an array of legal areas in its effort to modify preexisting rules. It suggests strongly that the justices were searching for all available tools to support their landlord-tenant law reform efforts.

Putting these ideas together, the tenant Cooper was allowed to use the breach of the landlord's express promise to fix the water seepage problems as a defense to the action for rent. She no longer had to file an independent action in another court. She was able to claim that the breach so substantially interfered with her possessory interest that she could either claim constructive eviction or the right to cancel the lease contract because of a material breach. And she was able to invoke the landlord's violation of its express duty of repair to justify her decision to leave the premises. Along the way, the court also made liberal use of exceptions to the parole evidence rule barring use of oral promises to modify written agreements and the statute of frauds requiring that leases longer than a year must be in writing to allow the tenant to use the landlord's oral promise to repair for her benefit.²⁸ In reaching these conclusions, however, the court issued a stream of dicta—statements in opinions not necessary to the decision. Rather than deciding the case using the simplest and most traditional constructive

eviction formula, the justices went out of their way to make pronouncements reforming landlord-tenant law and signaling to the property bar that, as Bob Dylan sang in 1964, "The times they are a-changin'."

The case actually involved two successive leases. The water leakage problems emerged during the first lease. When Cooper's business grew and she wanted more space she negotiated a new lease agreement for a larger space. During negotiations for the second lease, the landlord orally promised to fix the water seepage problems that had arisen during the first lease term. Most of the dicta arose from the court's handling of the first lease. Before the landlord made the express oral promise to fix the water problems, Cooper had signed the first lease acknowledging that she had inspected the premises and promised to carry the burden of making repairs. The court first wrote a long paragraph outlining the skimpy learning on tenant remedies in the courts and law reviews around the nation.²⁹ It then noted that the source of the water problems in the driveway that ran alongside the building was not in an area controlled by the tenant and that she therefore had no duty to make repairs. The driveway was a common area under the control of the landlord. The court went on to note that, even if the water problems were in the area leased by Cooper, she still did not have to make repairs. State law, the court asserted, had long since placed the repair burden for such major defects on the landlord, especially when the defect was not discoverable or known by the tenant before moving in. In essence a repair warranty for latent defects was implied.

I must add that it is not at all clear that any of the statutes cited by the court as authority for placing the repair obligation on the landlord—generally housing and building codes—operated to impose tort duties of maintenance on commercial landlords for spaces inside rented areas. That, of course, seemed not to bother the court. In addition, all of this discussion about the first lease and, most importantly, the language about implied warranties, was totally unnecessary to the result. It involved Cooper's status under the first lease, which was not even in effect at the time Cooper left the premises. All the court had to do was decide that Cooper was constructively evicted. Everything else was dicta. The justices clearly went out of their way in this commercial case to write about issues they knew were percolating in residential landlord-tenant law—the area most disturbing to New Jersey's urban residents.³⁰

Reste, therefore, was a wild opinion. The court threw everything at the problem it could. Property talk gave way to both contract and tort talk, intermingled in ways that are often impossible to untangle. Bargained-for duties of repair, like the landlord's oral promise, were treated as interchangeable with tortlike duties to repair. The court went out of its way to alter rules, create written contract clauses where none existed, enforce implied agreements that might not have been made, create tort duties where none were necessary to resolve the

dispute, and pay attention to all that anger and disorder welling up outside the courthouse doors.

When all was said and done, the structure of suits for unpaid rent was dramatically altered. Combining the substantive legal changes enunciated in *Reste* with the sea change in civil procedure that had occurred in New Jersey since the nineteenth century, tenants became free to file defenses and counterclaims to actions for rent just as defendants raised such issues in other sorts of cases. But none of this touched summary dispossession court—the court dealing with actions for possession for nonpayment of rent rather than suits for unpaid rent against tenants who left before the end of their terms. The substantive rules of leases and suits for rent were changed, but the summary dispossession court statutes were not at issue in *Reste*. That, of course, was the much more difficult problem taken up in *Marini*.

Marini v. Ireland

As noted, the New Jersey summary dispossession statute at issue in *Marini* originally barred appeals from summary dispossession decisions. When New Jersey overhauled its civil procedure statutes and rules in 1951 to adopt many of the same reforms introduced by adoption of the Federal Rules of Civil Procedure in 1938, the summary dispossession statute was amended to allow appeal on issues of jurisdiction while continuing to bar all other higher court reviews. Anyone who has sat through Civil Procedure in the first year of law school knows that, if a plaintiff makes a colorable claim for relief, the court has jurisdiction to hear the matter. There may be defenses to the claim, but that does not disturb the right of the court to entertain the underlying dispute. The rule is that a complaint well pleaded by a plaintiff provides jurisdiction. It doesn't guarantee a victory, but it does guarantee a hearing. So, if appeal under the summary dispossession statute was available only on matters of "jurisdiction"—on the power of a court to hear a case—the traditional understanding of that term barred appellate courts from reviewing disputes over sufficiency of the evidence, the availability of various defenses, or the underlying structure of substantive law. In short, if the New Jersey Supreme Court was to hear the *Marini* dispute, it had to do a hatchet job on the well-pleaded complaint rule and the meaning of the word "jurisdiction." And that is exactly what the court did.

The case arose in a happenstance manner. Gordon Lewis, a legal services lawyer, was in landlord-tenant court in Camden one day with his usual load of cases. Alice Ireland was there, trying without much success to explain her problems with a toilet. Lewis went up to her and asked if he could help. She said yes, and the rest, as they say, is history. The fact that a lawyer working for tenants was even present represented a major shift in legal culture from a just a decade earlier.

Some form of legal services for the poor had been around for a while, usually in the form of volunteer services or offices funded with donations from lawyers and other generous souls. But these services and offices were usually small and overwhelmed. The Ford Foundation was the first major organization to display a deep interest in legal services for the poor. It funded some experimental programs in the early 1960s, including both offices with attorneys serving only the needy and law school clinical education programs. A major part of President Johnson's War on Poverty was the creation of the Office of Economic Opportunity (OEO) in 1964. It was an amazing agency, empowered to give grants for community organizing and other local projects to help the poor. The government actually gave out money to groups of people pursuing complaints against local, state, and federal agencies.

Funding legal services programs was one of the first, most important and (other than Head Start) only long-lasting effort of OEO. In the same year OEO was established, Jean and Edgar Cahn published a seminal law review article advocating the establishment of a nationally funded legal services program.³¹ The Cahns were friends of Sargent Shriver, who had been appointed by President Johnson to run OEO. Their influence on Shriver's decision to begin funding legal services offices was critical. A large-scale grant program began in 1965. This infusion of funds allowed new legal services offices to open all over the country in the late 1960s, including the office where Gordon Lewis worked.³²

Ireland gave Lewis a copy of the summons and complaint in her summary dispossess action, along with a plumber's bill and a cancelled check. Shortly after she moved into 503B Rand Street in Camden in the spring of 1969, she noticed that her toilet was leaking. After the landlord did not respond to repeated requests for repairs, Ireland hired a plumber and paid the \$85.72 repair bill herself. When her July rent came due, she sent the landlord a copy of the bill, along with a check for \$9.28 to cover the difference between her rent and the cost of the repair. Marini cashed the check but demanded that the remainder of the rent be paid in cash. Ireland refused and was sued for possession on July 23.

When the case was tried, the trial judge concluded that there was no authority for "giving the right to tenant to engage plumber and have repairs made, then deduct amt. from rent."³³ The tenant appealed and obtained a stay of the eviction from the appellate division of the superior court. Pending resolution of the appeal, Ireland was ordered to pay Marini her monthly rent, except for the month in question. The New Jersey Supreme Court took the unusual step of certifying the case to itself for resolution before the appellate division could hear the case. It also stayed, pending review, the judgment for possession entered against her.

Several arguments were made on behalf of Alice Ireland in the appeal.³⁴ First, the claim was made that N.J.S. §2A:18-59—the section of the summary

dispossess statute limiting appeal to matters of jurisdiction—violated the Due Process and Equal Protection Clauses of the United States Constitution. The following section, N.J.S. §2A:18-60, allowed cases “of sufficient importance” to be transferred to the regular superior court, from which standard appeals were available. The contention was that this difference in treatment was arbitrary and made unfair distinctions between tenants.

Second, Ireland’s side argued that, if the statute were valid, there was no difference between jurisdiction and the merits of a case. If the tenant had a defense that was denied, that decision on the merits raised jurisdictional issues. And, finally, Ireland’s lawyers asserted that *Reste* and other developments required the court to allow tenants to raise repair-and-deduct defenses in actions brought for possession because of nonpayment of rent.

Gordon Lewis signed the brief for Ireland in the high court, but he was too busy to do much of the writing. Ken Meiser, a VISTA legal services attorney, and Joe Ippolito, then a third-year law student at Rutgers University School of Law in Camden, composed it.³⁵ Years later, Ippolito nostalgically recalled working on the case while he was a clinic student.³⁶ He was admitted to the bar just before the case was argued before the New Jersey Supreme Court. As a nice gesture, a motion was made at the beginning of the oral argument in *Marini* to add Ippolito’s name to the brief as an author. The court granted the motion immediately.³⁷

So what did the court do with the *Marini* case? N.J.S. §2A:18-53 provided that a landlord could obtain possession where a tenant “shall hold over after a default in the payment of rent, pursuant to the agreement under which the premises are held.” As is quite clear from the *Marini* complaint, the landlord alleged all the necessary aspects of such a claim: ownership by the landlord, possession under a valid lease, and default in the payment of rent. There really was no question that, using standard meanings of legal terms, the Camden County District Court had jurisdiction over the dispute. Under the summary dispossession statute, appeal should have been barred.

But the court allowed the appeal. Whether rent was in default, Justice Haneman opined, raised questions about both jurisdiction and the merits. “Whatever,” he wrote, “‘jurisdiction’ means in other settings, here it uniquely connotes the existence of one of the factual situations delineated in N.J.S. §2A:18-53. It follows that a finding, by the judge, that there is a default as alleged by the landlord, does not dispose of the meritorious issue alone. It as well disposes of the jurisdictional issue.”³⁸ Since the merits and jurisdiction merged under this logic, the tenant could appeal the merits. Quick and nifty—but surely this was totally out of sync with both the original purposes of the summary dispossession proceeding and the standard well-pleaded complaint rule used to evaluate the sufficiency of complaints ever since the Federal Rules of Civil Procedure were promulgated in 1938 and largely adopted in New Jersey

in the 1950s. The court, by merging jurisdictional allegations and proof of the merits, ignored the difference between the burden of pleading facts sufficient to provide a court with jurisdiction and the burden of proving facts sufficient to win a case once the court takes it. Presumably, the pressing social issues facing the court after the assassination of Martin Luther King Jr. and the dismal situation in New Jersey's urban areas led the court both to take the case away from the appellate division on its own motion and to render a result virtually unheard of in the annals of civil procedure courses everywhere.

After the court found it could entertain the appeal, it performed a second major reconstruction of the meaning of N.J.S. §2A:18-53 by holding that a default in the payment of rent occurred only if the rent was "owing." Under the old rules any unpaid rent was owing, period. Once the statute was construed this way, the court was free to rerun the reasoning of *Reste*, imply a warranty obligating the landlord to maintain the apartment according to the requirements of health and safety regulations, and find in favor of the tenant. By doing so, the court not only altered the old nineteenth-century notion that the conveyance of a period of possession in return for the payment of rent was a contract independent from the obligation to make repairs, it also took the critical step of moving the now interdependent covenants—including the implied warranty to maintain the premises—of a lease into summary dispossession court by allowing tenants to raise defenses to eviction actions.

Today we would ask whether such a major and arguably incoherent reconstruction of prior law was justified by the need for social reform. Why not wait for legislative action? In 1970, however, few doubted the wisdom of the court's actions. The justices felt compelled to act, and most of us attuned to the travails of landlord-tenant court at the time gave them a standing ovation for doing so.

Conclusion

The same extraordinary actions occurred elsewhere. As I noted in my *Javins* article, Judge Skelley Wright wrote an historically inaccurate but compelling opinion justifying the use of an implied warranty of habitability in Washington, D.C. And as I have written in another connection, the Illinois Supreme Court reconstructed the meaning of its summary dispossession statutes for the same reasons at almost the same moment. Other state courts behaved in a similar fashion. In short, the judicial creation of the implied warranty of habitability in landlord-tenant courts all over the country between 1968 and 1973 resulted from a widespread sense that elderly women in veils should no longer be seen struggling out of hearings bearing on their frail shoulders the weight of virtually uncontested judgments of eviction for nonpayment of rent.

Did all of this legal reconstruction do any good? It certainly left most people with a sense that it was possible to obtain some justice in landlord-tenant courts. Landlords declining to repair apartments now run the risk of getting tied up in litigation and losing actions for possession for nonpayment of rent. Fairness actually does break out from time to time. That certainly is worth a significant round of applause. But, as a practical matter, little has changed for most impoverished residential tenants. The few tenants who manage to obtain legal assistance and happen to be living in substandard apartments may be better off. But the low budgets for legal services programs mean that the vast bulk of tenants still do not receive legal help. Many fail to show up for hearings, have no defenses to their evictions, or lack the ability to raise available issues pro se. Most judges do not actively assist in raising defenses on behalf of unrepresented tenants. Settlement agreements between landlords and tenants calling for the continued payment of the regular rent plus installments on the arrears are routinely approved in most places without much inquiry.

The grotesque unfairness of 1968 has been replaced by a less charged version of the same scenario. Despite the naïve hope of many in my generation that providing defenses in landlord-tenant court would help large numbers of tenants and improve the quality of low-cost housing, most studies find that has not happened.³⁹ The reasons, I think, are clear. The notion that private property owners can afford to provide good-quality housing for poor people is untenable. If we want to house all of our fellow citizens in acceptable quarters, we as a society must be willing to foot the bill. Historically, we have been unwilling to do it. Until we change that tune, all of us will continue to confront daily evidence of our culture's miserliness in the faces of the homeless and poor.

NOTES

1. *Rosewood v. Fisher*, 263 N.E.2d 833 (Ill. 1970), actually involved possession by a purchaser of residential real estate under an installment contract rather than possession by a tenant. In Illinois the same statute governed eviction of contract purchasers and tenants. The holding allowing defenses to be raised in possession actions was applicable to both kinds of disputes. For an exhaustive presentation of the history surrounding *Rosewood v. Fisher*, see "Discriminatory Housing Markets, Racial Unconscionability, and Section 1988: The Contract Buyers League Case," *Yale Law Journal* 80 (1971): 516. I have also added a bit to the historical record on *Rosewood*. Richard Chused, "The Roots of *Jack Spring v. Little*," *John Marshall Law Review* 40 (2007): 395. My article on *Javins v. First National Realty, Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), is the most complete history of that case. See Richard Chused, "*Javins* (a.k.a. *Saunders*) v. First National Realty Corporation," *Georgetown Journal on Poverty Law and Policy* 11 (2004): 191-247. An abridged version of the piece is available in *Property Stories*, 2nd ed., ed. Gerald Korngold and Andrew P. Morriss, 123-170 (Eagan, MN: Foundation Press, 2009).

2. There are no major articles on the case and mine is the only teaching text to use it as a principal case. Richard Chused, *Cases, Materials and Problems in Property* (Dayton, OH: Lexis Nexis, 2010).
3. See, for example, Arthur M. Louis, "The Worst American City," *Harper's*, January 1975, 67 (rating Newark the worst of fifty cities by a large margin, with St. Louis next on the list).
4. For a brief summary of Camden's history see http://en.wikipedia.org/wiki/Camden,_New_Jersey (last accessed June 18, 2010).
5. Camden, according to the 1950 Census, had a population of 124,555. That fell to 102,551 by 1970 and 84,910 in 1980. In thirty years Camden lost well over 30 percent of its population.
6. See Chused, "Javins," 191-247.
7. 53 N.J. 444 (1969).
8. Heckel served as dean between 1963 and 1970 and as acting dean in 1973-74. He also served as the moderator of the Presbyterian Church USA in 1972 and as an elder after his term as moderator ended. He died in 1988. "C. Willard Heckel, 74, Ex-Law Dean Dies," *New York Times*, April, 7 1988. As I wrote Dean Heckel a few years before his death, during my years at Rutgers, he was a gentle soul who served in the midst of tumult in both the law school and the state of New Jersey.
9. The *Newark Star-Ledger* maintains an excellent Web site on the city and the 1967 riot, which contains an interesting set of demographic tables. "1967 Newark Riots," *Star-Ledger*, accessed May 6, 2010, <http://www.nj.com/newark1967/>.
10. George Sternlieb, *The Tenement Landlord* (New Brunswick, NJ: Rutgers University Press, 1986), 228.
11. In addition to Newark, the commission investigated events in Northern New Jersey, Plainfield, and New Brunswick. *The 1968 Report of the National Advisory Commission on Civil Disorders*, 56-84.
12. Pub. L. 88-352, 78 Stat. 241, the major provisions dealt with employment; Pub. L. 89-110, 79 Stat. 437, commonly called the Voting Rights Act; Pub. L. 90-284, 82 Stat. 81, also known as the Fair Housing Act.
13. Economic Opportunity Act of 1964, Pub. L. 88-452, 78 Stat. 508.
14. Governor Richard J. Hughes, a Democrat, used such surprisingly strong language in describing the Newark riot. A "visibly haggard" governor, it was reported, "called Newark 'a city in open rebellion' after a day of touring the riot-torn area of the city." Donald Warshaw and James McHugh, "Hughes: 'A City in Open Rebellion,'" *Newark Star-Ledger*, July 15, 1967.
15. The modern era of the court began with the adoption of a new state constitution by New Jersey in 1947 and the appointment of Arthur Vanderbilt to run the reconstituted supreme court. During the years prior to the resolution of *Marini v. Ireland*, the court decided a number of important cases including *Michaels v. Brookchester*, 26 N.J. 379 (1958) (using building and housing codes as a basis for imposing tort duties on residential landlords); *Henningsen v. Bloomfield Motors*, 32 N.J. 358 (1960) (approving strict liability doctrine); and *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70 (1965) (imposing implied warranties on developers of new residential housing).
16. Some well-known personalities, including both Democrats and moderate Republicans, sat on the court. Chief Justice Joseph Weintraub was widely known as a leading independent-minded American jurist. Daniel J. O'Hern, "Some Reflections on the Roots of Differing Judicial Philosophies of William J. Brennan, Jr. and Joseph Weintraub," *Rutgers Law Review* 46 (1994): 1049; Dominick A. Mazzagetti, "Chief Justice Joseph Weintraub: The New Jersey Supreme Court 1957-1973," *Cornell Law Review* 59

(1974): 197; "Justice Joseph Weintraub Is Dead; Former New Jersey Court Head," *New York Times*, February 7, 1977; "A Humanist on the Bench: Joseph Weintraub," *New York Times*, August 8, 1957. Justice Haydn Proctor, a Republican, was a respected judge with a well-honed sense of fairness and empathy. Roger Lowenstein, "Remembering Haydn Proctor," in *Jersey Jurists: Profiles in the Law*, ed. Carol Vivian Bello and Arthur T. Vanderbilt, 97-99 (New Brunswick, NJ: New Jersey Institute for Continuing Legal Education, 1998); Robert McGill Thomas Jr., "Haydn Proctor, 93, a Judge and New Jersey Senator," *New York Times*, October 5, 1996; "Haydn Proctor, 93, Former N.J. Senator," *Miami Herald*, October 7, 1996. Justice John Francis, the author of the opinion in the *Henningsen* case, was one of the most well respected state court judges in the country. Thomas F. Lambert, "Changing the Law: Justice Francis and Products Liability Law," in Bello and Vanderbilt, *Jersey Jurists*, 63-67. Walter H. Waggoner, "John Francis Dies; Ex-Jersey Judge," *New York Times*, July 6, 1984. A few years after the *Marini* case was decided, Justice Frederick W. Hall authored the opinion in the famous zoning case of *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151 (1975). The *Mount Laurel* result, which invalidated suburban zoning schemes that limited construction of multiple-family and other types of low-cost housing, reflected Hall's approach to civil law reform. Justice Vincent S. Haneman, another Republican and the author of the *Marini* opinion, worked his way up through the ranks of both the Republican Party and the New Jersey court system before being appointed to the supreme court in 1960. This was a common phenomenon through the middle of the twentieth century as powerful chief justices urged promotion of good judges through the lower courts and eventually to the high court.

17. 53 N.J. 444 (1969).

18. *Marini v. Ireland*, 56 N.J. 130 (1970).

19. Chused, "Jack Spring," 395-396.

20. See *Moore v. Townshend*, 33 N.J.L. 284, 300 (1869). The same rules that were applied to tenants were also used in other similar situations. The most common involved settings where one person had the right to possess land for his life and another had the right to own it after the life possessor died.

21. Act of March 17, 1795, Ch. DXLVII, 1795, N.J. Laws 1095 (preventing waste). Section two of this act provided: "[a]nd be it enacted by the authority aforesaid, That no tenant for life or years, or for any other term, shall, during the term, make or suffer any waste, sale or destruction of houses, gardens, orchards, lands or woods, or any thing belonging to the tenements demised, without special license in writing making mention that he may do it."

22. *Moore v. Townshend*, 33 N.J.L. 284 (1869).

23. 86 N.J.L. 648 (1914).

24. At common law, this sort of result applied even when the rented premises were destroyed by fire or other calamity. So long as the landlord was blameless the tenant still had to pay rent. *Coles v. Celluloid Manufacturing Co.*, 39 N.J.L. 326 (1877). This particular hardship was remedied in many places, including New Jersey, by statute in the nineteenth century. New Jersey's reform was adopted in 1874, and is now codified at N.J.S. §§ 46:8-6 and 46:8-7. This statute effectively requires the landlord, rather than the tenant, to maintain a hazard insurance policy on the premises.

25. Landlords, for example, had to reserve the right to retake possession in their leases in order to sue before the end of the term. They also had to prove that self-help remedies such as distraint or seizure of goods would not provide adequate financial relief.

26. Act of April 5, 1813, chapter 194, 1820 N.Y. Laws 176 (amending the "Act Concerning Distresses, Rents, and the Renewal of Leases"). Spurred by economic dislocations of the late 1830s and early 1840s, application of the statute later was limited to residential leases by excluding cases where tenants had more than five years of occupancy left under their leases. An Act to Amend the Revised Statutes, in Relation to Summary Proceedings to Recover Possession of Demised Premises, chapter 162, 1840 N.Y. Laws 119. The reasons for passage of this statute are set forth in Senate Report No. 65, *Documents of the Senate of the State of New York* (1840).
27. Act of March 4, 1847, 1847 N.J. Laws 142 (Supplement to "An Act Concerning Landlords and Tenants"). The New Jersey statute lacked the protections for long-term tenants found in New York.
28. Oral understandings modifying written contracts typically are barred both by the statute of frauds and the parole evidence rule. But a standard exception allows a court to review oral agreements if they are partially performed and relied upon by the tenant. Here, the landlord did make efforts to repair the problems and the tenant did rely on the promise in agreeing to the second lease.
29. The literature was indeed sparse. Only three articles of note existed. Hiram H. Lesar, "Landlord and Tenant Reform," *New York University Law Review* 35 (1960): 1279; Hiram H. Lesar, "The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?" *Kansas Law Review* 9 (1961): 369; Robert Schoshinski, "Remedies of the Indigent Tenant: Proposal for Change," *Georgetown Law Journal* 54 (1966): 519. Only Schoshinski's piece discussed rent and summary dispossession actions—the arena of most importance for residential tenants.
30. Although less important for purposes of understanding the background to *Marini*, the *Reste* court also altered constructive eviction law and overruled *Stewart v. Childs Company*. Rather than requiring the tenant to show that the landlord intended to deprive the lessee of possession, the court ruled that effective dispossession was enough. Given the similarity in the facts of *Stewart* and *Reste*, the court elected to overrule the old case as it changed the rule.
31. Edgar S. Cahn and Jean Cahn, "The War on Poverty: A Civilian Perspective," *Yale Law Journal* 73 (1964): 1317.
32. For more on the early history of legal services, see Earl Johnson Jr., *Justice and Reform: The Formative Years of the American Legal Services Program* (New York: Russell Sage Foundation, 1973); Alan W. Houseman, "Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward," *Fordham Urban Law Journal* 29 (2002): 1213; John Mahoney, "Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States," *St. Louis University Public Law Review* 17 (1998): 223.
33. Taken from judge's notes, Appendix of Brief of Appellant in *Marini v. Ireland*, p. 8a.
34. This summary is based on the briefs filed by the Defendant-Appellant in both the Appellate Division of the New Jersey Superior Court and the New Jersey Supreme Court.
35. VISTA (Volunteer in Service to America) was a federally funded program that placed him in the Camden Legal Services Office, where the case was handled. Interview with Fritz Mulhauser, February 1998.
36. Joseph V. Ippolito, "Marini v. Ireland: Recollections Thirty Years Later," *New Jersey Lawyer* 207 (2001): 38.
37. Joseph V. Ippolito, in an interview with Fritz Mulhauser, February 1998.
38. *Marini*, 56 N.J. at 138–39.

39. In general, litigation over housing conditions has had an impact on residential quality only in places with comprehensive, long-term code enforcement programs or similarly intensive efforts to use building receivership systems to control landlords who fail to repair their apartment buildings. Standard code enforcement programs or use of the implied warranty of habitability in landlord-tenant court has little impact. The literature is large. See Bruce Ackerman, "Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy," *Yale Law Journal* 80 (1971): 1093; Neil Komesar, "Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor," *Yale Law Journal* 82 (1973): 1175; Bruce Ackerman, "More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar," *Yale Law Journal* 82 (1973): 1194; Marilyn Mosier and Richard Soble, "Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court," *University of Michigan Journal of Law Reform* 7 (1973): 8; Werner Hirsch, Joel Hirsch, and Stephen Margolis, "Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate," *California Law Review* 63 (1975): 1098; Note, "The Great Green Hope: The Implied Warranty of Habitability in Practice," *Stanford Law Review* 28 (1976): 729; Richard Markovits, "The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications," *Harvard Law Review* 89 (1976): 1815; Allan Heskin, "The Warranty of Habitability Debate: A California Case Study," *California Law Review* 66 (1978): 37; Duncan Kennedy, "The Effect of the Warranty of Habitability on Low Income Housing: 'Milking' and Class Violence," *Florida State University Law Review* 15 (1987): 485.